

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

FAO NO. 820 OF 2005.

Date of Decision: September 14, 2007.

Nirmala Devi @ Preeti wife of Vijay Kumar son of Avinash Chand @ Dev Raj, resident of House No. 34/35, Gurdwara Gali, Ward No.9, Cinema Road, Mansa.

Appellant.

Versus

Vijay Kumar son of Avinash Chand @ Dev Raj, resident of 1094, Dugri Phase II, Ludhiana.

Respondent.

Before: Hon'ble Mr. Justice R.S.Madan.

Present: Shri S.K.Jain, Advocate, for the appellant.

Shri R.S.Ghuman, Advocate, for the respondent.

R.S.Madan, J

Vijay Kumar, respondent herein, filed a petition under Section 13 of the Hindu Marriage Act in the Court of Additional District Judge, Ludhiana on December 04, 1999 and secured ex-parte decree dated December 12, 2000 in his favour.

A perusal of the record shows that the appellant was summoned by way of publication in Chardi Kalan for November 22, 2000. The fact of passing of the ex-parte decree was not within the knowledge of the appellant. She moved an application under Section 125 of the Code of Criminal Procedure before the Judicial Magistrate Ist Class, Mansa, on July 18, 2001, in which reply was filed on March 07, 2002, wherein he discloses about the factum of securing the ex-parte decree of divorce. This led to the

filing of petition under Order 9 Rule 13 of the Code of Civil Procedure, for setting aside the ex-parte decree dated December 12, 2000. It was pleaded in the application that since she gained knowledge about the passing of the ex-parte decree of divorce from the written reply filed by the respondent, she moved the present application on April 15, 2002. The said application was dismissed on October 13, 2004. Though, there was delay of 7 days in filing the present appeal, at the request of counsel for the appellant, the delay of 7 days stands condoned.

Heard.

It is not disputed between the parties that the appellant-wife was served by way of Publication i.e. substituted service in Chardi Kalan Daily. Article 123 of the Limitation Act provides 30 days limitation for setting aside of the ex-parte decree from the date of passing of the decree or from the date the applicant gains knowledge. The explanation below the Article 123 lays down that substituted service is no service in the eyes of law. For a ready reference Article 123 of the Limitation Act and its explanation is reproduced as under:-

“123-To set aside a decree passed ex-parte or to rehear an appeal decreed or heard ex-parte- Thirty days.

Explanation:- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service”.

Taking into consideration the statutory provisions that substituted service by way of publication in the Newspaper is no service in the eyes of law. Thus the ex-parte decree passed consequent upon the substituted service is liable to be set aside.

No doubt after the appellant gains knowledge of the passing of the ex-parte decree on March 07, 2002 from the filing of written reply in a

petition under Section 125 of the Code of Criminal Procedure, in the court of Judicial Magistrate 1st Class, Mansa, it was thereafter that she filed the application for setting aside the ex-parte decree. The learned Additional District Judge vide order dated October 13, 2004 dismissed the application.

It is pertinent to mention here that none of the parties had brought the provisions of Article 123 and the explanation enumerated therein to the notice of the learned Additional District Judge, at the time of disposal of the application. Had this fact been brought to the notice of the Additional District Judge, the result of the application for setting aside the ex-parte decree would have been otherwise. It is the cardinal principle of jurisprudence that in Matrimonial cases the parties must be heard before they ask for the relief under any provisions of Sections 9 to 14 by giving them a chance to be heard. It is commonly noticed by this Court that the husband petitioner while securing the decree of divorce normally gave wrong address of the respondent so that they could easily secured the ex-parte decree of divorce. The case in hand is not an exception.

Taking into account the facts and circumstances of the case, this Court is of the view that the ex-parte judgment and decree dated December 12, 2002 passed by the learned Additional District Judge, Ludhiana is liable to set aside. Accordingly, the appeal is allowed and the ex-parte judgment and decree passed by the learned Additional District Judge is set aside.

As a result of my above discussion, the case is remanded back to the Court of learned District Judge, Ludhiana, who shall restore the case to its original number and date.

The parties through their counsel are directed to appear before the learned District Judge, Ludhiana on October 04, 2007. It would be open for the District Judge, Ludhiana either to keep this case on his own board or to entrust the same to any of the Additional District Judge under his supervision, who shall dispose of the case expeditiously preferably

within a period of six months, of the receipt of a certified copy of this order.

The original record of the petition filed under Section 13 of the Hindu Marriage Act is with the trial court. However, the record which was received in this Court with regard to the application for setting aside the decree, be sent back to the court concerned.

September 14, 2007.
Malik

(R.S.Madan)
Judge